

March 14, 2018

**VIA ECFS**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington, DC 20554

Re: *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84

Dear Ms. Dortch:

More than a month after the months-long, carefully considered recommendations generated through the multistakeholder BDAC process,<sup>1</sup> through which the BDAC voted to approve an OTMR recommendation, NCTA, Comcast, Charter, and Cox have submitted a totally different proposal that undermines the progress made by the BDAC.<sup>2</sup> This after largely ignoring—or, in the case of Comcast, even voting in favor of—the BDAC recommendation.

Even setting aside the extremely late timing of NCTA's proposal, the substance of the make-ready proposal is fatally flawed. NCTA's proposed make-ready improvements entirely fail to address the fundamental problems with the existing make-ready rules and procedures—in particular, the gross inefficiency, unnecessary costs, and risks to safety of multiple truck rolls and trips up a pole, and the ability of existing attachers to thwart the ability of new competitors to enter the market. NCTA's proposal would add more costs and increase risk for new entrants, making expanded broadband deployment even less likely.<sup>3</sup> While NCTA's overall goal of

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<sup>1</sup> See Report of the Competitive Access to Broadband Infrastructure Working Group, *presented to* the Broadband Deployment Advisory Committee of the Federal Communications Commission, Washington, DC (Jan. 23-24, 2018).

<sup>2</sup> Letter from Steve Morris, NCTA, to Marlene H. Dortch, FCC, WC Docket No. 17-84 (filed Mar. 5, 2018) (“NCTA Ex Parte”).

<sup>3</sup> See, e.g., Perspectives on the Current State of Make Ready and the Potential Impact of a One-Touch Make-Ready Policy of CMA Strategy Consulting at 1, *attached to* Letter from Katharine Saunders, Verizon, to Marlene H. Dortch, FCC, WC Docket No. 17-84 (filed Nov. 13, 2017) (“CMA Study”) (“Sequential make-ready performed by different parties is very unpredictable, inefficient, and results in significant delays.”); Letter from Katharine R. Saunders, Verizon, to Marlene H. Dortch, FCC, WC Docket No. 17-84, at 2 (filed Nov. 21, 2017) (“Verizon Nov. 21, 2017 Letter”) (citing CMA Study) (“Anticipating these delays, the report concludes that the new attacher routinely budgets a worst-case scenario, which effectively shrinks the new attacher’s contemplated deployment radius. Some providers even choose the more expensive option of deploying underground because those deployments can be more predictable.”).

reducing the number of days from application submission to completion of make-ready work seems helpful on a first glance, its touted improvements are likely illusory.

The most serious flaws in the NCTA proposal are as follows:

First, NCTA proposes a 30-day timeframe for existing attachers to perform their own make-ready work and insists that this 30-day timeframe would be a concurrent deadline on all existing attachers.<sup>4</sup> NCTA's proposed clarification that make-ready is to be performed concurrently, however, merely restates existing law and ignores the physical realities of make-ready work. Most simple make-ready work involves moving facilities down or up the pole to open up space for a new attachment. It goes without saying that if all existing attachments must be moved down (or up) the pole in order to make space for a new attachment, those existing attachments must be moved *in order*.<sup>5</sup> That means the lowest attachment must be moved before the next lowest can be moved, and so forth. Where each attacher performs its own make-ready work, that necessarily requires multiple, sequential—not concurrent—trips to the pole. NCTA even acknowledges that concurrent make-ready may not be possible when it provides that “If the make-ready work required by an existing attacher. . . cannot be performed until after the utility performs make-ready, the existing attacher’s time frames for completion of make-ready are tolled until such utility make-ready work is complete and the utility has provided notice to the existing attachers.”<sup>6</sup> Where the utility needs to complete its make-ready before other attachers can perform their own make-ready work, this provision would give the utility—which will sometimes be a direct competitor of the new attacher—the power to delay the make-ready process for the new attacher.

Second, NCTA proposes a 90-day advance notification of large deployments by new attachers to the utility and all third party attachers *before a single application is filed*.<sup>7</sup> This not only pushes out their proposed timeframes by three months, but also gives a new provider’s direct competitors advance warning of their planned deployments. This proposal is hard to justify on any grounds, but even if such advance notification could be rationalized as an efficiency measure, the countervailing competitive concerns far outweigh that minimal benefit—particularly where the need for incumbent attachers to stage their contractors and prepare for make-ready work could be entirely eliminated by adopting one-touch make-ready. This provision is conveniently omitted from the NCTA’s chart claiming that their proposal saves time in the make-ready process.

Third, by allowing existing attachers to both unilaterally determine whether make-ready is simple or complex as well as to have veto power over approved contractors, NCTA’s proposal would obliterate those few remedies available to new attachers under the current system and would destroy new attachers’ ability to have any control over the timing of their own

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<sup>4</sup> NCTA Ex Parte at 2; *see also id.* at Attachment § 1.14xx(c).

<sup>5</sup> *See, e.g.*, Letter from Kristine Laudadio Devine, Counsel to Google Fiber, Inc., to Marlene H. Dortch, FCC, WC Docket No. 17-84, at 2 (filed Feb. 1, 2018); Letter from Katharine R. Saunders, Verizon, to Marlene H. Dortch, FCC, WT Docket No. 17-79, WC Docket No. 17-84, at 3 (filed Mar. 8, 2018).

<sup>6</sup> NCTA Ex Parte at Attachment § 1.14xx(g).

<sup>7</sup> *Id.* § 1.14xx(h).

deployment. Indeed, the self-help remedy permissible under NCTA's proposal would provide even less relief to new providers than the current rules, as NCTA would allow each existing attacher to approve its own contractors for make-ready on its facilities.<sup>8</sup> If existing attachers could require that a different contractor perform make-ready for each of their attachments, the process could be even worse than today's flawed process.

Fourth, NCTA's proposal presses for changes that would tilt the playing field even further toward existing attachers. In particular, NCTA reiterates the call<sup>9</sup> for broad third-party indemnification of existing attachers by new attachers. But as Google Fiber and others have explained,<sup>10</sup> such an indemnification obligation would expose new attachers to potentially unbounded liability—and without any corresponding benefit. New attachers should be responsible for any damage to pole owners' or existing attacher's facilities caused by their use of OTMR, but requiring indemnification for consequential or third party damages would only expose them to liability for damages for which existing attachers are not currently liable.<sup>11</sup> It is important to remember that even under the current rules that have proved to be barriers to desired deployment there is no such requirement when a new attacher is finally able to use the self-help remedy.

NCTA's call for a surety bond requirement has similar problems—by setting a \$1 million benchmark, the proposed rule would price many smaller providers out of the market entirely. This would be especially problematic for small proposed deployments.

Fifth, NCTA touts that its proposal shortens deployment timeframes—but that assertion is belied by the particulars of its proposed rules, including the 90 day advance notice of large deployments, the tolling of make-ready timelines while utility make-ready is completed, the

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<sup>8</sup> *Id.* § 1.422(d). Compare with 47 C.F.R. § 1.1422(b) (allowing a new attacher to select from a list of contractors pre-approved by the pole owner).

<sup>9</sup> See, e.g., Letter from Steve Morris, NCTA, to Marlene H. Dortch, FCC, WC Docket No. 17-84, at 2 (filed Nov. 8, 2017); Letter from Ola Oyefusi, AT&T Services, Inc., to Marlene H. Dortch, FCC, WC Docket No. 17-84, Attachment at 2 (filed Aug. 17, 2017); Reply Comments of Comcast Corporation at 11, WC Docket No. 17-84 (filed July 17, 2017).

<sup>10</sup> See, e.g., Letter from Kristine Laudadio Devine, Counsel to Google Fiber, Inc., to Marlene H. Dortch, FCC, WC Docket No. 17-84 (filed Nov. 30, 2017); Letter from Katharine R. Saunders, Verizon, to Marlene H. Dortch, FCC, GN Docket No. 17-83, WC Docket No. 17-84, at 6 (Jan. 19, 2018).

<sup>11</sup> Frustratingly, NCTA supports this request by saying that the Commission “has endorsed similar indemnification requirements,” NCTA Ex Parte at 3, and citing to the Commission’s 2011 order adopting make-ready rules for the first time, as well as a 2008 order addressing leased access. In fact, neither order supports the proposition for which NCTA cites it. In both orders, in fact, the Commission *declined* to adopt risk-allocating rules. In the 2011 pole attachment order, it “reject[ed] the argument that attachers' use of outside contractors exposes utilities to liability for substandard work,” *Implementation of Section 224 of the Act: A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240, 5266 ¶ 52 (2011), and noting that “we presume that utilities could structure attachment agreements to . . . address liability or other concerns they might have,” *Id.* 5261 ¶ 39. In the case of leased access, the Commission found that it would be reasonable for a cable system operator to require a leased access programmer “to obtain reasonable liability insurance coverage,” *Leased Commercial Access*, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd. 2909, 2922 ¶ 27 (2008), but confirmed that it would “continue to address complaints about specific contract terms and conditions on a case-by-case basis.” *Id.* 2923 ¶ 28.

seven day period for the existing attacher to provide its list of approved contractors, and the obligation to consult with the existing attacher and its preferred contractor before any self-help may be available. Once these individual time frames are included, it is clear that NCTA's proposal does not appreciably reduce the amount of time a new attacher must allocate to the pole attachment process, and in some cases, could even extend it.

Of course, the majority of NCTA's time saving comes in the pre-make-ready phase, by shortening the timeframe for application and survey.<sup>12</sup> But Google Fiber's experience is that most of the delay, inefficiency, and cost-overruns involved in network deployment occurs in the make-ready phase, due to the need for make-ready to be coordinated amongst multiple attachers and performed in order by each entity.

Taken as a whole, there is nothing in NCTA's proposal that would lead anyone familiar with how the pole attachment process works in practice to believe that it would be any better than the current system—which almost everyone believes is broken. It is no surprise that NCTA, Comcast, Charter, and Cox declined to bring their proposal to the table during the BDAC process, even though they had ample opportunity to do so<sup>13</sup>—indeed, Comcast, was a member of the working group that developed the One Touch Make Ready (“OTMR”) process over the course of several months, and voted to approve its recommendation, along with 23 other members of the BDAC.<sup>14</sup>

The working group and the BDAC recognized that OTMR, unlike other proposals advanced in the record and during working group meetings, is a viable alternative that will create numerous benefits for broadband deployment. By reducing inefficiency and waste in make-ready, adoption of OTMR will shift the core economic assumptions that inform deployment planning.<sup>15</sup> OTMR will allow new attachers to pay for one trip to the pole instead of several, facilitate streamlined engagement of contractors, reduce duplication of effort, and eliminate the need to pay pass-through administrative costs of existing attachers—all factors that make deployment of new networks expensive and slow. OTMR, moreover, may not only be more

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<sup>12</sup> NCTA Ex Parte at Attachment §§ 1.1420(c), (d).

<sup>13</sup> Representatives from NCTA, Comcast, Charter, and Cox participated in working groups and on the BDAC. *See FCC Announces the Membership of Two Broadband Deployment Advisory Committee Working Groups: Competitive Access to Broadband Infrastructure and Removing State and Local Regulatory Barriers*, GN Docket No. 17-83, Public Notice, DA 17-476, at 3 (May 16, 2017) (naming Comcast to the Competitive Access to Broadband Infrastructure Working Group); *id.* at 5 (naming representatives from Charter and NCTA to the Removing State and Local Regulatory Barriers Working Group); *FCC Announces the Membership of Two Broadband Deployment Advisory Committee Working Groups: Model Code for Municipalities and Model Code for States*, GN Docket No. 17-83, Public Notice, DA 17-433, at 2 (May 8, 2017) (naming Cox to the Model Code for Municipalities Working Group).

<sup>14</sup> *See FCC, Broadband Deployment Advisory Committee Meeting – Day 1*, at 149:13 (Jan. 23, 2018), <https://www.fcc.gov/news-events/events/2018/01/broadband-deployment-advisory-committee-meeting-day-1>. At the BDAC meeting where the report was presented, Comcast asked for certain modifications to the proposal, which were accepted, and then voted yes on the proposal. *See id.* at 146:15.

<sup>15</sup> *See* Letter from Thomas J. Navin, Counsel to Corning, Inc., to Marlene H. Dortch, FCC, WT Docket No. 17-79, at Attachment A at 5 (filed Jan. 25, 2018) (estimating that “impacts from OTMR alone could result in about 8.3M in incremental premises passed over the FTTP Base case and about \$12.6B in associated incremental capital expenditure”).

efficient, but may also improve safety and reliability, “when a limited number of experienced contract personnel perform the work.”<sup>16</sup> The cost savings and other improvements that result from the use of OTMR may make it possible for new attachers to expand their planned service areas.<sup>17</sup> For example, the cost savings from OTMR may make it possible for a provider to deploy to areas that otherwise would not have presented a business case because they are less densely populated.<sup>18</sup>

Please do not hesitate to contact me with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'KLD', with a stylized flourish at the end.

Kristine Laudadio Devine  
*Counsel to Google Fiber Inc.*

Cc: Claude Aiken  
Amy Bender  
Adam Copeland  
Lisa Hone  
Daniel Kahn  
Paul LaFontaine  
Travis Litman  
Michael Ray  
Jay Schwarz  
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<sup>16</sup> Letter from Eben M. Wyman, Power and Communication Contractors Association, to Marlene H. Dortch, FCC, WC Docket No. 17-84, at 2 (filed Dec. 1, 2017).

<sup>17</sup> See Verizon Nov. 21, 2017 Letter at 2 (citing CMA Study) (“Anticipating these delays, the report concludes that the new attacher routinely budgets a worst-case scenario, which effectively shrinks the new attacher’s contemplated deployment radius. Some providers even choose the more expensive option of deploying underground because those deployments can be more predictable.”).

<sup>18</sup> See *id.*